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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 1 of the Commission's Rules--Competitive Bidding Proceeding	))	WT Docket No. 97-82

PETITION FOR RECONSIDERATION

The undersigned Commission licensees who are participating in the installment payment program (the "Joint Petitioners")[1/] hereby submit their petition for reconsideration of the Commission's Third Report and Order in the referenced proceeding.[2/] The Joint Petitioners focus on one glaring error in the Third Report and Order: the retroactive adoption of grace period payment penalties for licensees participating in the Commission's installment payment program. In support hereof, the following is respectfully shown.

I. Background

Existing Commission "grace period" rules are straightforward. Installment payment licensees were provided with an automatic, no cost 90-day grace period. 47 C.F.R. 1.2110(c)(4). Thus, a

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1/ Alpine PCS, Inc., Cellular Holding, Inc., Communications Venture PCS, L.P., Eldorado Communications, L.L.C., Jacksonville Wireless, L.P., KMTEL, L.L.C., Mercury PCS II, L.L.C., Northern Michigan PCS Consortium, L.L.C., Southern Wireless, L.P., and Wireless 2000, Inc.

2/ Amendment of Part 1 of the Commission's rules--Competitive Bidding, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Third Report and Order, FCC 97-413, 13 FCC Rcd 374 (1998) ("Third Report and Order").

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licensee scheduled to make payment on day one may extend the date of payment through day 91, without incurring any penalty, simply by making request for such extension. These rights are incorporated into notes and security agreements executed by installment licensees.[3/]

Notwithstanding the above, in its Notice[4/] in this proceeding the Commission proposed to make its existing rules inoperative and "to simplify the grace period procedures".[5/] Unfortunately, this "simplification" is a costly one to licensees. Whereas previously the 90-day extension to which they were entitled was penalty-free, the new rules provide significant penalties for this same period. Regrettably, this penalty is imposed upon the very group of installment licensees that Congress directed the Commission to assist in the auction process. Where payments are made within 1-90 days of the nominal due date, a 5% penalty is assessed; where payments are made between 91-180 after the nominal date for payment, the penalty is 10%. During each of these 90 day

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3/ Existing C Block notes make no mention of any grace period penalties; F Block notes provide for a 5% penalty only "upon an event of default", i.e., after close of applicable grace periods; they make no mention of any 10% penalty.

4/ Amendment of Part 1 of the Commission's rules--Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking, WT Docket No. 97-82, 12 FCC Rcd 5686 (1997) ("Notice")

5/ Id., at 5725.

periods, it matters not whether the payment is made on the first or the last day--the same exorbitant penalty amount applies.[6/]

II. Argument

A. The Commission's Rules Constitute an Impermissible Retroactive Rulemaking

The core problem presented by the Commission's new grace period penalty rule is that which is generally present in cases of retroactive applications of new rules: fundamental inequity. The Supreme Court, in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), effectively created a presumption against retroactive rulemaking. See, 1 K. Davis & R. Pierce Administrative Law Treatise §6.6 at 257-60 (3d ed. 1994). The fact that the law so clearly disfavors retroactive rules, see, Bowen, 488 U.S. at 208, should itself cause the Commission not to apply its rule retroactively to existing licenses. Recent Supreme Court cases serve only to bolster this position. See, e.g., Landgraf v. U.S.I. Film Products, 114 S.Ct. 1483 (1994) and Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994).

The Supreme Court has established the overriding criterion that retroactive application is improper if "the ill effect of the retroactive application" of the rule outweighs the "mischief" of frustrating the interest that the rule promotes. SEC v. Chenery

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6/ To illustrate, a licensee owing $10 million to the government, at 6% interest, must make quarterly interest only payments of $150,000. Previously, licensees had a penalty-free grace period of at least 90 days. Now, they must pay a penalty of $7,500 for payment between 1-90 days late. The effective interest rate for delinquent payments thus is between 20% (if payment is 90 days late) and 1800% (if payment is 1 day late).

Corp., 332 U.S. 194, 203 (1947).[7/] Whether, after applying the balancing test mandated by Chenery, retroactivity is permissible, is a legal question that can be resolved only by analyzing the applicable facts and circumstances. Retail Union, at 390. When such questions are presented to reviewing courts, the courts treat them as a question of law for which no overriding obligation of deference to the agency exists. Id.

The court in Retail Union enunciated the particular factors to be considered in balancing the hardship from retroactive application against any public interest considerations. Retail Union, at 390; see also, Cellular Lottery Rulemaking, 98 FCC 2d 175, 182 (1984). These include (a) whether the issue presented is one of first impression; (b) whether the new rule presents an abrupt departure from well-established practice; (c) the extent to which the party against whom the new rule is applied relied on the former rule; (d) the degree of burden which a retroactive rule imposes on a party; and (e) the statutory interest in applying a new rule despite the reliance of a party on the old standard. Each of these factors should have been, but was not, considered by the Commission when it determined how to apply the new rule.

The Third Report and Order includes no discussion of why the rules should be applied retroactively, and any reasoned

7/ See, also, Retail, Wholesale, and Dep't Store Union v. NLRB, 466 F.2d 380, 389-390 (D.C. Cir. 1972) ("Retail Union") and Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987), where the D.C. Circuit recognized the governing applicability of the Chenery test.

consideration of such factors can lead only to a determination not to apply the new rule retroactively. First, this is not a case of first impression, as evidenced by prior rules on this subject. Second, the new rule constitutes an "abrupt departure" from established practice, wherein there was no late payment penalty. The next Retail Union consideration, i.e., the extent to which the licensee may have relied on prior rules, can be readily answered simply by looking at the terms of the notes that they executed after being directed to do so by the Commission, and seeing that they include no penalty terms for the first 90 day grace period.[8/] The new rules deprive licensees of existing rights.

The last Retail Union criterion to be applied is the statutory interest in applying a new rule retroactively. Here, there is none. Because in its Third Report and Order the Commission has effectively determined not to utilize installment payment options any longer, there is no bona fide statutory interest to be achieved by virtue of applying the rule any way, much less retroactively.

In sum, the Commission did not consider the criteria that it was required to consider. And if it had considered them properly retroactive application would not have been provided.

8/ The documents do include cryptic reference to compliance with rules to be adopted in the future. But without even a hint as to what these future changes could involve, no significance can be attached to those hollow provisions that were unilaterally imposed by the government.

B. The Newly Adopted Rules and Associated Revised Notes Violate Existing Contracts with the Government

With the advent of auctions, the Commission's regulatory responsibilities have become immensely more complicated. Previously, the Commission's spectrum allocation and assignment processes involved only issues of efficient and appropriate spectrum use. Now, the Commission also has to be concerned about banking responsibilities, contractual agreements and taking in revenues to offset the budget deficit.

Unfortunately, when the Commission promulgated its new penalties for payment during grace periods, it appears to have considered its role as a regulator in a vacuum. It did not consider appropriately its status as a party to numerous contracts. Yet, because the Commission has entered into various contracts with its licensees, in the form of promissory notes and security agreements, the Commission is not now empowered to unilaterally change the terms of those agreements any way it wants, any time it wants. See, e.g., United States v. Windstar Corporation, 116 S. Ct. 2432 (1996).

The Commission's grace period payment penalty rule is arbitrary and capricious in that it is inconsistent with the terms of existing promissory notes. Licensees who were forced to sign such notes as a condition to remaining eligible for an installment payment program (even though such notes were never discussed prior to C Block licenses being bid at auction) are now told that the government will not be held to the very contract terms that it thrust upon its licensees. Indeed, recognizing the inconsistency created between existing notes and the revised rules, the Commission is now demanding that licensees sign new notes that include changes (i.e., the penalty provisions) that significantly disadvantage them. This the government cannot do without opening itself to liability for breach of contract. California Federal Bank v. United States, 1997 W.L. 780936 (Fed. Cl.) December 22, 1997.

III. Conclusion

In an era where the Commission has made much ado about the need to maintain the "integrity" of its rules, it is particularly galling for the Commission to change, after the fact, key components of its installment payment program whenever it suits the Commission's fancy. This failing is uniquely egregious where, as is the case here, the persons negatively affected are the very small businesses for whom Congress has mandated the Commission to provide special assistance. The new rule is even more inexcusable and impermissible when viewed in the context of the contractual arrangements that have already been entered into with licensees governing installment payment obligations.

For all of these reasons, the Commission's late payment penalty rule is arbitrary and capricious. Thus, it must be rescinded.

Respectfully submitted,

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